STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. HN15HC-66749

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| [redacted], | ) | |
| | ) | |
| Complainant, | ) | Administrative Action |
| | ) | |
| v. | ) | **FINDING OF PROBABLE CAUSE** |
| | ) | |
| Xanadu at Wall, | ) | |
| | ) | |
| Respondent. | ) | |

On November 29, 2017, Monmouth County resident [redacted] (Complainant)[1] filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her condominium association's board of trustees (Respondent or the Board) refused her request for a reasonable accommodation for her disabilities, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. The DCR investigation found as follows.

## Summary of Investigation

Respondent is the condominium association board of a condominium community called Xanadu at Wall (Xanadu) in Wall, New Jersey. The community consists of several buildings, including the building in which Complainant lives and a separate community clubhouse. Complainant and her husband lived in Xanadu from 2010 to 2018.

Complainant alleged that Respondent violated the LAD when it designated the door located nearest to her apartment, which had always been officially an emergency door but had never been treated as such, as an "Emergency Exit Only" door and refused to give her a key so that she could continue to use the door to enter and exit the building. She argued that the symptoms of her disability are exacerbated by walking, and that using the door closest to her apartment shortened her route to and from the community's common areas.

Complainant told DCR that she her disability prevented her from leaving her apartment much between 2010 and 2012, but explained that she had been using the emergency door nearest to her apartment to enter and exit her building between 2012 and November 2016, when the community members voted to have that door – and all other doors that were not main entrances

[1] The original verified complaint included [redacted] as a complainant. During the course of the investigation, [redacted] told DCR that her husband was not part of the complaint. DCR's investigation considered only whether Respondent discriminated against [redacted] by refusing her request for an accommodation for her disability.

to buildings –locked and the alarm set on a regular basis. After the vote, Respondent affixed an "Emergency Exit Only" sign to the door. Complainant stated that she requested that the Board grant her the accommodation of a key for the emergency door so that she could continue using it to enter and exit the building.

The investigation revealed that Complainant needed to walk significantly further to access the community common areas if she used the building's main entrance rather than the door in question. Complainant obtained a report from Anchor Investigative Services (the Report) which showed that the total distance from the entrance to her apartment to the common areas using the main door was 482 feet and 11 inches. The total distance using the emergency door was 96 feet 1 inch. DCR's investigators visited the site and determined that the latter route required Complainant to navigate about 18 stairs total, 6 of which were outside the emergency exit door. Complainant explained that her doctor told her that walking long distances would exacerbate the conditions related to her disability but emphasized that he never told her that she could not walk up and down stairs.

Complainant also told DCR that she is not aware of anyone using the emergency door to commit a crime or enter the building for an illegitimate reason during the many years that the door remained unlocked and unalarmed.

Respondent denied Complainant's allegations of discrimination in their entirety. Respondent told DCR that it rejected Complainant's request after determining that allowing her to routinely enter and exit the building through the emergency door would create a security issue for the community; a safety issue for Complainant (who would need to navigate multiple sets of stairs, including outdoor stairs that became dangerous during the winter season); and a noise disturbance for other community members because the alarm would sound whenever the door is opened.

Respondent provided minutes from a November 14, 2016 meeting in which the community members voted on whether the door should remain an emergency exit and be officially locked and alarmed. According to the minutes, the community members voted to have the door designated exclusively an emergency exit and to install a new "Emergency Exit Only" sign on it. On November 18, 2016, Respondent sent an email to community members announcing the decision.

On November 19, 2016, Complainant wrote an email to the Board members questioning the fairness of the vote. She wrote part:

> We feel this decision directly impacts our quality of life as handicapped residents and questions the boards [*sic*] compliance with the NJ Fair Housing Act, the NJ state Statute (Title 39) for the handicapped and the Wall Municipal ordinance (Article V) pertaining to handicapped parking. Via this correspondence, we **formally** request the door in question be keyed to allow both entrance and exit, as was the door on the south side of building B. We would hope that the board will

> give this request due diligence and receive proper legal guidance prior to any further action or re-installment of the "Emergency Exit Only" sign.
>
> On the issue of security being a reason for this decision, I trust that will also be part of the discussion at the Homeowners meeting. There are many issues regarding security throughout the community. We are puzzled why entrance and exit through the door closest to our unit would be an issue of security as opposed to any other door into an "unsecured community."
>
> The message from the board states, "the topic will be made part of the Agenda for discussion and voting at the December 1st, 2016 Annual Homeowners Meeting. [*sic*]. We respectfully request the board advise the residents, prior to the meeting, under which part of the previously published agenda this matter will be discussed.

Respondent produced an email from Township of Wall Construction Official/Inspector Robert Torrance, dated November 30, 2016, in which the fire and electrical inspector wrote:

> The designation of the door as an emergency exit only is the prerogative of the association and the management of the building, the building code only requires that the door have free access from the inside for use in case of an emergency. Nothing in the code would preclude that door from having a keyed lock or electronic access control system from the outside as long as it was [*sic*] still was available for use as an exit without use of a key or special knowledge from the inside.

In a December 2, 2016 email to Respondent's counsel, Complainant attached a letter to the Board formally requesting that it accommodate her disability by allowing her to enter and exit through the "Emergency Exit Only" door near her apartment. In the letter, Complainant requests to be granted a key that would allow her to enter and exit through that door.

By way of email dated January 3, 2017, Respondent's counsel replied by inquiring into the specifics of her request. Counsel concluded the email by noting his client's concerns that because the route using the "Emergency Exit Only" door involved Complainant having to descend indoor and outdoor staircases, it was more dangerous than her simply walking further and using elevators and the main exit. Counsel couched his objection in terms of safety to Complainant in using the requested route. Counsel did not address that Complainant had been using that route for six years.

On March 23, 2017, Complainant's counsel, [redacted]., sent a letter to Respondent's counsel restating Complainant's prior request that Respondent accommodate her by providing her with a key that would allow her to enter and exit her building through the emergency door. [redacted] included the report from Anchor Investigative Services showing the difference in distance that Complainant needed to walk from the handicapped parking space closest to her unit if she used the main entrance as opposed to the emergency exit, and a letter

dated February 10, 2017, from Complainant's doctor, [redacted], D.O., stating that her disability required access to the door closest to her apartment. [redacted] note reads in part:

> Upon through [*sic*] evaluation of the patient, it is my professional opinion that this request is appropriate. I am basing this on my goals of slowing worsening of her conditions, and preventing new injuries from occurring. A person's environment is a very important area to focus on in attempting to improve their quality of life, and this request is not unreasonable.
>
> Should you need further information, do not hesitate to contact me. In an attempt to protect her patient privacy, I am intentionally not specifying her medical conditions. I hope it suffices that I assure you that there are numerous, and severe, conditions that exist, and are chronic in nature. Due to these injuries, she is clearly handicapped and would greatly benefit from your assistance in this matter.

On March 30, 2017, Respondent's counsel sent an email. He noted that Complainant and her husband had a designated handicapped spot in the community garage that was most easily accessible using the elevator and an exit other than the emergency door. He yet again emphasized his concern that because the route required Complainant to use more stairs to access the emergency exit including stairs outside of the emergency exit that become snowy and icy during the winter, it might exacerbate Complainant's condition or be dangerous for her. He also inquired into whether the accommodation would require Respondent to spend more money ensuring that the stairs leading to the emergency exit were immediately cleared of snow and ice, in the same way that the main entrance to Complainant's building was immediately cleared after winter storms.

He opined that, "It appears on its face that the accommodation could increase the likelihood of an accident or fall, allow unauthorized access to the building, and create unsafe conditions." Respondent's counsel once again did not address the fact that Complainant had been using the door in question since 2010.

On April 7, 2017, [redacted] associate [redacted]., replied via email that Complainant's request had nothing to do with parking and was instead related only to use of the emergency door for entering and exiting her building. She noted that Complainant was not requesting any accommodation other than a key that she could use to enter and exit the building through the emergency door. She asserted that the accommodation would not create a more dangerous condition for Complainant and that the accommodation would not contemplate anyone other than Complainant using the door. [redacted] concluded:

> The request does not affect the safety of the community nor does it affect the security of the community. The accommodation if granted certainly would not increase the likelihood of accident or fall nor would it allow unauthorized access or unsafe conditions. It appears from reading your e-mail that some or all of the

> board members may have misunderstood the request. Simply, the request is for [Complainant] to be provided a key so that she can exit and reenter through that door so that she does not have to travel the great distance depicted in the original Investigative Report. . . .
>
> I respectfully request that you recommend the board grant the above accommodation for my client for its limited purpose; said request is reasonable, presents no rick to the association and can be accommodated at minimal cost.

The Board discussed Complainant's request before the May 1, 2017 Homeowner's Meeting. On May 4, 2017, Complainant sent an email to [redacted], an employee of Association Advisors, the management company for Xanadu, which read in part:

> I have still not received a written answer to my request for a reasonable accommodation. At the meeting on May 1, 2017, [redacted] eluded [*sic*] to a meeting with the board attorney to answer a home owner's request. She stated it was "denied." [redacted] also responded to a resident that the legal conference was regarding the handicap access. The board is walking a fine line and this information has been forwarded to my attorney. I am once again asking for a written response to my request. If the request was denied it needs to be put in writing. Association Advisors has an obligation and responsibility in this also. Ignoring the request only further violates the law.

Complainant told DCR that she never received a written denial from the Board.

The DCR investigation found that Respondent's attorney sent an email to Complainant's attorney on August 11, 2017, stating that Complainant was aware of the Board's denial of her accommodation as of May 1, 2017, and pointing out that the Board confirmed the denial of her request on August 10, 2017. Respondent's attorney invited Complainant's counsel to submit any additional accommodation requests or information to the Board for further review.

There were no further communications between the parties.

DCR's investigator visited Respondent's property for a second time in August 2018. During the visit, [redacted] opened the fire exit at issue. The investigator noted that lights began to flash on the door and it produced a loud warning noise. [redacted] told the investigator that opening the door alerts an employee at the building's front desk, who must check to make sure that there is no emergency and that no one entered the building without permission. She expressed concern that the alarm would disturb all of the residents whose homes are within several hundred feet of the exit. She noted that short of completely deactivating the system, she could not think of a way to give Complainant access to the emergency exit that would allow her to open it without setting off the alarm.

DCR asked Respondent to explain why it could not provide Complainant with a key that

would allow her to access the building through the emergency exit without setting off the alarm. Respondent replied that it had not considered this option because Complainant had never made that specific request to the Board. Respondent's counsel opined that no such device exists. Counsel also noted that the cost of such a key would have been an issue, and stated that Complainant would have had to bear the cost of installing it. Counsel concluded by requesting that DCR provide evidence that such a key exists for the door in question.

DCR's research revealed that anyone can purchase systems for emergency exits that allow for certain individuals with keys or entry codes to enter and exit without setting off the alarm. These systems are available at different price points.[2]

## Analysis

At the conclusion of an investigation, the DCR Director is required to determine whether probable cause exists to credit a complainant's allegations of the verified complaint. N.J.A.C. 13:4-10.2. For purposes of that determination, probable cause is defined as a reasonable ground for suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person to believe that the LAD was violated. Ibid. If the Director determines that probable cause exists, then the complaint will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). However, if the Director finds that there is no probable cause, the determination is deemed to be a final agency order subject to review by the Appellate Division of the New Jersey Superior Court. N.J.A.C. 13:4-10(e).

The LAD prohibits discrimination in housing on the basis of disability. N.J.S.A. 10:5-12(g). Disability discrimination includes a refusal to make "reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling." N.J.A.C. 13:13-3.4(f)(2). A requested accommodation must "enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability." Estate of Nicolas v. Ocean Plaza Condominium Ass'n, Inc., 388 N.J. Super. 571, 588 (App. Div. 2006) (internal quotations omitted).

The duty to provide a reasonable accommodation "does not entail the obligation to do everything humanly possible to accommodate a disabled person." Oras v. Housing Authority of City of Bayonne, 373 N.J. Super. 302, 315 (App. Div. 2004). Requests must survive a fact-specific balancing test that weighs the cost of making the accommodation against the benefit that an occupant would gain should the housing provider grant the accommodation. Ibid.

Complainant argues that on balance, the benefits to her of granting the accommodation outweigh any detriment to Respondent. Respondent contends that allowing Complainant to enter and exit the building through the armed emergency door would create a security issue for the community and a noise disturbance for other community members. Respondent also argues that

[2] See e.g., https://www.keylessaccesslocks.com/keyless-style/panic-exit-bars.html.

it is safer for Complainant to walk on flat ground than use stairs.

None of Respondent's asserted reasons for denying Complainant's requested accommodation are supported by proof sufficient to demonstrate that the burden of granting the accommodation outweighs the benefit to Complainant.

First, Respondent offered no evidence to support its assertion that Complainant's safety and health would be jeopardized by her use of the stairs more than by walking a significantly longer distance on flat ground. The only medical evidence in the investigative record is to the contrary on this point, and Respondent has not explained why it did not accept Complainant's doctor's conclusion that allowing her to use the exit nearest her apartment was best for assuaging the effects of her disability.[3] With respect to potential liability should Complainant fall on the outside stairs in snowy conditions, Respondent's responsibility to maintain a safe premises for its home owners remains the same no matter the frequency with which the emergency exit stairs are used. Presumably, should there be an emergency during a snow storm, and one or more home owners sustain injury because the emergency exit stairs were not cleared, Respondent would not argue that it should not have cleared the stairs of snow and ice because they were rarely used.

Second, Respondent has not offered any evidence to support its assertion that giving a single resident a key to an emergency exit would make the community less secure. The evidence shows that the door in question was unlocked and unalarmed for at least 4 years prior to Complainant's request for a key, and Respondent has not provided any evidence that use of the door created a security risk for the community even when it was left completely open to the public.

Finally, Respondent has not offered any evidence that it was unable to give Complainant a key that would disarm the alarm with each use. Instead, Respondent's counsel argued that it did not need to consider whether the emergency door could be keyed because Complainant never made that specific request. Even after DCR requested information on the subject of keying the emergency door, rather than providing DCR with proof that either it was impossible to install such a system or that it would be cost-prohibitive, Respondent's counsel asked that DCR research whether such systems exist and that DCR provide Respondent's counsel with information about similar systems. DCR's research showed that such systems are readily available in different price ranges. It is incumbent on Respondent to explore such options before

[3] Prior to Complainant filing the instant matter with DCR, in its communications with Complainant's counsel, Respondent's counsel continually emphasized that the Board was leery of granting Complainant's request to use the emergency exit because it believed that using stairs would be more dangerous to Complainant than walking a longer distance on flat ground to use the common areas. Respondent maintained this posture even after it received a note from Complainant's doctor stating that using the entrance closest to her apartment would ameliorate the conditions related to her disability. When considering a request for a reasonable accommodation, it is neither Respondent's nor its counsel's place to usurp the role of Complainant's doctor by determining what accommodation is best for her specific disability. See e.g., Staszak v. Kimberly-Clark Corp., 2002 U.S. Dist. LEXIS 14882 at *14-15 (N.D. Ill. Aug. 9, 2002) (stating that in the context of employment discrimination an employer may not substitute its opinion about an employee's physical limitations for those of a licensed medical practitioner)

outright denying Complainant an accommodation based on an assumption that it will be unduly burdensome – or impossible – to grant her request.

Considered individually and in tandem, Respondent's reasons for denying Complainant's request that she be allowed to use the emergency exit located nearest her apartment and be given a key to permit her, and only her, access through that door do not support a clear conclusion that the costs to Respondent outweigh the benefits that Complainant and her doctor believed she would have gained from the requested accommodation.

Based on the above, the Director finds at this preliminary stage of the process that the circumstances of this case support a "reasonable ground of suspicion" to warrant a cautious person in the belief that the matter should "proceed to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56

Date: January 8, 2019

Rachel Wainer Apter, Director
New Jersey Division on Civil Rights